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Not-So-Secret Secrets - The State of the Attorney-Client Privilege in North Carolina in the Wake of In re Investigation of Death of Eric Miller and Crawford v. Washington

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Not-So-Secret Secrets? The State of the Attorney-Client Privilege in North Carolina in the Wake of *In re Investigation of Death of Eric Miller* and *Crawford v. Washington*

The murder of Dr. Eric Miller in December 2000 had the makings of the type of legal drama that interests the media and excites the public.[1] Eric Miller, a young research doctor and father to his infant daughter Clare, died as a result of arsenic poisoning.[2] Police suspected that his wife, Ann Miller Kontz,[3] and her lover, Derril Willard, were involved in his death.[4] The suspense heightened when Willard committed suicide.[5] Within months it became clear that the real legal drama would spring not from the circumstances surrounding Miller's death, but from an attorney's fight to keep the contents of a client consultation secret.[6] With Kontz refusing to cooperate with the investigation and Willard having taken his own life within weeks of Miller's death, prosecutors focused their attention on the attorney Willard consulted prior to his suicide: Rick Gammon.[7]

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1. For a sample of newspaper accounts of the investigation, see Oren Dorell, *Arsenic Case Hinges on Circumstantial Evidence*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 27, 2001, at A1; Oren Dorell, *Police Probe Unusual Death*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 4, 2000, at B1; Oren Dorell, *Toxic Compound Is Seized*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 13, 2000, at B3; Oren Dorell, *Warrant Issued in Arsenic Probe*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 22, 2001, at B1; Eric Ferreri, *Raleigh Police Are Investigating Death of Young UNC Researcher; Traces of Arsenic Found in Man's System, but Officials Doubt Occupational Exposure*, CHAPEL HILL HERALD (Durham, N.C.), Dec. 8, 2000, at 1; Craig Jarvis & Oren Dorell, *Lives Intersect in Tragedy*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 11, 2001, at A1; Thomasi McDonald, *Cops Seize Computer in Arsenic Death*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 24, 2000, at B5; Jay Price et al., *Man Linked to Poisoning Kills Himself*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 23, 2001, at A1; Jay Price & Oren Dorell, *Widow Gets Legal Help*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 24, 2001, at B1; Beth Velliquette, *Postdoc's Death Still a Mystery*, CHAPEL HILL HERALD (Durham, N.C.), Dec. 14, 2000, at 1; Andrea Weigl, *N&O Sues To Unseal Autopsy Report, a Public Document*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 17, 2001, at B3.

2. Dorell, *Arsenic Case Hinges on Circumstantial Evidence*, *supra* note 1.

3. In November 2003, Ann Miller married Paul Martin Kontz. Brooke Cain, *The Case So Far: Timeline of the Death of Eric Miller and Its Investigation*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 11, 2004, at A16.

4. *See In re* Investigation of Death of Eric Miller (*Miller I*), 357 N.C. 316, 319–20, 584 S.E.2d 772, 777 (2003); Dorell, *Arsenic Case Hinges on Circumstantial Evidence*, *supra* note 1.

5. *Miller I*, 357 N.C. at 319–20, 584 S.E.2d at 777.

6. *Id.*

7. *Id.*; Cain, *supra* note 3.

The court ordered Gammon to reveal the substance of his conversations with Willard. Gammon responded by invoking the attorney-client privilege and refusing to disclose the contents of the conversations.[8] The attorney-client privilege protects the confidential communications between an attorney and client from revelation, requiring an attorney to keep the privileged information confidential.[9] The court's order put Gammon in a difficult situation. Disclosing privileged information would subject Gammon to discipline from the North Carolina State Bar.[10] Conversely, if Gammon refused a court order to reveal the information, he could be held in contempt, serve jail time, or lose his license to practice law.[11]

In *In re Investigation of Death of Eric Miller* (*Miller I*),[12] the Supreme Court of North Carolina granted discretionary review to determine whether the trial court could order Gammon to reveal the contents of his conversations with Willard.[13] The court's opinion specifically addresses whether the contents of Willard's conversations with Gammon are protected from disclosure by the attorney-client privilege. The problem is that the opinion speaks about the scope of the privilege's protection in broad terms that could potentially extend far beyond the facts of the case.[14] In brief, *Miller I* upholds existing

8. *Miller I*, 357 N.C. at 320, 584 S.E.2d at 778.

9. *See id.* at 328, 584 S.E.2d at 782; State v. McIntosh, 336 N.C. 517, 523, 444 S.E.2d 438, 441–42 (1994).

10. *See* N.C. RULES OF PROF'L CONDUCT R. 8.4 (2004). Rule 8.4 states that any violation of the Rules of Professional Conduct shall be professional misconduct. Rule 1.6 establishes a duty of confidentiality. This duty of confidentiality is different from the attorney-client privilege. The attorney-client privilege is an evidentiary common law doctrine that applies in limited contexts. *See infra* notes 41–42 and accompanying text. Rule 1.6 is an ethical duty that governs all information an attorney receives relating to the representation of a client. Because Rule 1.6 is broader than the attorney-client privilege, it necessarily covers information protected by the attorney-client privilege. Therefore, if Gammon wrongly revealed privileged information, he would also violate Rule 1.6 and would be guilty of professional misconduct pursuant to Rule 8.4. *See also* R. 1.6 cmt. 14 (requiring a lawyer who is ordered to reveal information relating to a client's representation to assert all nonfrivolous claims that the information sought is protected from disclosure by the attorney-client privilege or other applicable law). *But see id.* R. 1.6 cmt. 13 (noting that other law may supersede Rule 1.6, in which case paragraph (b)(1) of the Rule permits "such disclosures as are necessary to comply with the law").

11. North Carolina courts have an inherent power to discipline attorneys. *In re* Delk, 336 N.C. 543, 550, 444 S.E.2d 198, 201 (1994). This power includes the ability to disbar an attorney. *Id.* The North Carolina State Bar also has the authority to sanction attorneys. N.C. GEN. STAT. § 84-28 (2003). *See* Andrea Weigl, *How Safe Are Your Secrets? What Your Doctors, Lawyers and Clergy May Reveal*, NEWS & OBSERVER (Raleigh, N.C.), July 7, 2002, at A19.

12. 357 N.C. 316, 584 S.E.2d 772 (2003).

13. *Id.* at 320–21, 584 S.E.2d at 778.

14. *See id. passim.*

case law establishing the scope of the attorney-client privilege, but then carves out an exception to the privilege, holding that when the underlying justifications for the privilege are not furthered by its continued application, the privilege ceases to apply.[15] The court's decision raised concern within the local legal community that future courts might apply the holding broadly, severely eroding the protections afforded by the attorney-client privilege.[16]

This concern is not unwarranted. While the court attempted to limit its holding to the facts of *Miller I*, the holding is broad enough to leave open the possibility that North Carolina courts will use *Miller I* to justify a wide variety of intrusions upon the attorney-client privilege. However, this Recent Development predicts that *Miller I* will be narrowly applied by future courts and thus should not pose a great threat to the attorney-client privilege. The analysis first outlines the current standards North Carolina courts utilize for applying the attorney-client privilege and how the holding in *Miller I* alters those standards. It then examines the potential application of *Miller I* beyond its facts and concludes that the court intended its broad language to ensure the revelation of Willard's conversations with Gammon, but did not intend to generally corrode the protections of the attorney-client privilege.[17] The next section predicts that the United States Supreme Court's recent holding in *Crawford v. Washington*[18] will not protect Willard's conversations with Gammon and statements made under similar circumstances from being admitted as evidence in criminal trials. This section also explores whether the United States Supreme Court's holding in *Ohio v. Roberts*[19] will keep the statement from being admitted, concluding that it will not. Finally, this Recent Development discusses the impact the holdings in *Miller I* and *Crawford* will have on how North Carolina attorneys practice law.

A review of the circumstances surrounding Eric Miller's death provides context for the issue facing the Supreme Court of North

15. *Id.* at 342–43, 584 S.E.2d at 791.

16. *See* Matthew Eisley, *Nearly Half Favor Disclosure*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 19, 2003, at B6; *Legal Events: Dead Men Tell No Tales, but from Now On in North Carolina, the Task Might Fall to Their Lawyers*, MIAMI DAILY BUS. REV., Sept. 18, 2003, at 10, LEXIS, Business & News Library, MIADBR File.

17. *See Miller I*, 357 N.C. at 342, 584 S.E.2d at 790 (noting that "the instant case presents unique circumstances," and emphasizing that it is "a rare case where the full application of the [holding's] rationale would apply.").

18. 541 U.S. 36 (2004).

19. 448 U.S. 56 (1980).

Carolina in *Miller I*.[20] In November 2000, Eric Miller was hospitalized for arsenic poisoning following an evening spent with his wife and her co-workers, including Derril Willard, at a bowling alley.[21] That evening Willard gave Miller a beer which Miller remarked had a "funny taste."[22] Miller recovered at home until December 1, when he became violently ill and returned to the hospital.[23] He died the following day.[24] An autopsy and toxicology report indicated that Miller received at least one dose of arsenic months before he died and at least two doses in the days and weeks prior to his death, including one administered during his final hospitalization.[25] Kontz cremated Miller's body and refused police requests for interviews except to comment to police on the day of Miller's death that she had no idea why anyone would poison him.[26] A search of Kontz's workspace at GlaxoSmithKline produced a chemical compound containing arsenic, and further testing proved that the arsenic found in Miller's body matched the substance found in Kontz's lab.[27]

Willard also refused requests for police interviews after Miller's death.[28] Police soon learned that Kontz and Willard were involved in a romantic relationship and had contacted each other with increasing frequency immediately before and after the bowling alley incident.[29] Shortly after Miller's death, Willard met with attorney Rick Gammon to obtain legal counsel.[30] Following this meeting, Willard told his wife he might be charged with the attempted murder of Miller.[31] Willard committed suicide on January 22, 2001.[32] He left a note that stated in part, "I have been accused of an action for which I am not responsible. I have taken no one's life, save my own."[33]

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20. For a sequential summary of the facts of the investigation and subsequent court proceedings, see Cain, *supra* note 3.

21. *Miller I*, 357 N.C. at 319, 584 S.E.2d at 777.

22. *Id.*

23. *Id.*

24. *Id.*

25. Cain, *supra* note 3.

26. *Miller I*, 357 N.C. at 319, 584 S.E.2d at 777.

27. Cain, *supra* note 3.

28. *Miller I*, 357 N.C. at 319, 584 S.E.2d at 777.

29. *Id.* at 319–20, 584 S.E.2d at 777.

30. *Id.* at 320, 584 S.E.2d at 777.

31. *Id.*

32. Cain, *supra* note 3.

33. *Id.*; Andrea Weigl & Oren Dorrell, *Part of What Derril Willard Told His Lawyer Is Read in Court, Implicating Eric Miller's Wife*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 11, 2004, at A1.

Prosecutors wanted more than circumstantial evidence before charging anyone with Miller's murder.[34] After learning of Willard's consultations with Gammon, prosecutors sought disclosure of the substance of their conversations.[35] The Wake County Superior Court ordered Gammon to provide the court with a sealed affidavit for an in camera review to determine whether the interests of justice required disclosure of the information.[36] Gammon appealed the order, claiming the information was protected under the attorney-client privilege. The Supreme Court of North Carolina agreed to a discretionary review of Gammon's appeal.[37]

The Supreme Court of North Carolina did not know the contents of Willard's conversations with Gammon when it considered Gammon's appeal of the trial court's ruling.[38] The conversations were likely to contain one of three revelations relevant to the murder investigation: (1) Willard confessed to murdering Miller; (2) Willard confessed to involvement, with the aid of a third party, in Miller's murder; or (3) Willard revealed the third party killer's identity. Prosecutors believed Gammon possessed information that would help identify the killer or absolve potential suspects of guilt.[39] Willard's suicide declaration that he had not taken anyone's life supported this belief, creating speculation among police and the prosecution that the conversations would identify Kontz as the murderer.[40] In order to discover what information Willard disclosed to Gammon, prosecutors needed the court to conclude that the conversations were not protected by the attorney-client privilege.

In North Carolina, the attorney-client privilege is a common law doctrine and not a statutory codification.[41] While there are

34. *See* Brief for Appellee at 6, *Miller I* (No. 303PA02), *available at* http://www.ncappellatecourts.org/nc_main_1.nsf (noting that the district attorney sought disclosure of the information Gammon received from Willard) (on file with the North Carolina Law Review). Prosecutors did not charge Kontz with Eric Miller's murder until after they learned the contents of the conversation. Andrea Weigl, *Miller's Widow Charged*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 28, 2004, at A1.

35. *See* Cain, *supra* note 3. Prosecutors learned of the consultations from Willard's widow. *Id.*

36. *Miller I*, 357 N.C. at 320, 584 S.E.2d at 777–78; Cain, *supra* note 3.

37. *Id.* at 320–21, 584 S.E.2d at 778.

38. *Id.* at 320–21, 584 S.E.2d at 777–78 (noting that the trial court stayed compliance with its order that Gammon reveal the contents of the conversation pending appeal).

39. *See* Brief for Appellee at 4–5, *Miller I* (No. 303PA02), *available at* http://www.ncappellatecourts.org/nc_main_1.nsf (on file with the North Carolina Law Review).

40. *See* Brief for Appellant at 4, *Miller I* (No. 303PA02), *available at* http://www.ncappellatecourts.org/nc_main_1.nsf (on file with the North Carolina Law Review).

41. *Miller I*, 357 N.C. at 329, 584 S.E.2d at 783; Kenneth S. Broun, *Death and the Privilege*, N.C. ST. B. J., Spring 2004, at 48; William A. Oden, III, Comment, *To Speak or*

exceptions to the privilege that permit disclosure,[42] the privilege is absolute in the sense that a trial judge lacks the discretion to abrogate it.[43] The privilege belongs to the client, not the attorney.[44] Thus, the attorney is not at liberty to waive the privilege without obtaining informed consent from the client.[45] Absent informed client consent, an attorney may not reveal information acquired during the professional relationship with the client.[46]

Prosecutors raised two alternative arguments to persuade the court that Willard's statements to Gammon fell within an exception to the attorney-client privilege. First, they argued that Mrs. Willard—acting as the executrix of her husband's estate and therefore as his personal representative—waived the privilege.[47] Second, prosecutors argued that the trial court properly applied a balancing test within its inherent authority to act in the interests of justice when it ordered the communications disclosed.[48] The supreme court found neither argument compelling.[49]

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42. *See Miller I*, 357 N.C. at 328, 584 S.E.2d at 782 (citing State v. McIntosh, 336 N.C. 517, 524, 444 S.E.2d 438, 442 (1994) (permitting disclosure where the defendant consulted an attorney solely to facilitate the defendant's surrender); State v. Taylor, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) (permitting disclosure through a waiver where the client alleged ineffective assistance of counsel); State v. Brown, 327 N.C. 1, 21, 394 S.E.2d 434, 446 (1990) (permitting disclosure where the communications were conducted in the presence of a third party not acting as an agent); *In re* Will of Kemp, 236 N.C. 680, 684, 73 S.E.2d 906, 909–10 (1953) (permitting disclosure when the attorney testified as to testator's intent in an estate dispute)).

43. Broun, *supra* note 41, at 48.

44. *Miller I*, 357 N.C. at 339, 584 S.E.2d at 788; *Taylor*, 327 N.C. at 152, 393 S.E.2d at 805.

45. *See* State v. Bronson, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992); *Taylor*, 327 N.C. at 152, 393 S.E.2d at 805.

46. *See Miller I*, 357 N.C. at 328, 584 S.E.2d at 782.

47. *See* Brief for Appellee at 25, *Miller I* (No. 303PA02), *available at* http://www.ncappellatecourts.org/nc_main_1.nsf (on file with the North Carolina Law Review).

48. *See id.*

49. *See Miller I*, 357 N.C. at 323–34, 584 S.E.2d at 779–85. The court prefaced its discussion of the State's arguments by holding that the attorney-client privilege survives the client's death. *Id.* at 323, 584 S.E.2d at 779 (citing the United States Supreme Court's and other jurisdictions' recognition that the attorney-client privilege continues after the client's death); *see also* Swidler & Berlin v. United States, 524 U.S. 399, 405 (1998); State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976); Wesp v. Everson, 33 P.3d 191, 200 (Colo. 2001); Mayberry v. State, 670 N.E.2d 1262, 1267–68 (Ind. 1996); Dist. Attorney for Norfolk Dist. v. Magraw, 628 N.E.2d 24, 26 (Mass. 1994); McCaffrey v. Estate of Brennan, 533 S.W.2d 264, 267 (Mo. Ct. App. 1976); Taylor v. Sheldon, 173 N.E.2d 892, 895 (Ohio 1961); Curato v. Brain, 715 A.2d 631, 636 (R.I. 1998); S.C. State Highway Dep't v. Booker, 195 S.E.2d 615, 620 (S.C. 1973). The court then concluded that Mrs. Willard did not have the authority to waive her husband's attorney-client privilege. *Miller I*, 357 N.C. at 327, 584

Rather than searching for possible exceptions to the privilege that would permit the disclosure of Willard's statements, the Supreme Court of North Carolina began by questioning whether the communications fell within the scope of the attorney-client privilege.[50] To determine whether the attorney-client privilege applies to a particular communication, the courts in North Carolina apply a five-part test known as the *McIntosh* test.[51] If Willard's conversations with Gammon satisfied the five prongs of the *McIntosh* test, then Gammon was bound to keep the contents of these conversations confidential. The five prongs are:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.[52]

The court framed the central issue in *Miller I* as "whether, during a criminal investigation, there can be a legal basis for the application of the interest of justice balancing test or an exception to the attorney-client privilege which would allow a trial court to compel the disclosure of confidential attorney-client communications when the client is deceased."[53] A court could determine whether Willard's statement satisfied the first, second, and fifth prongs of the *McIntosh*

S.E.2d at 782. Finally, the court addressed the trial court's use of the balancing test. The trial court applied the balancing test without the benefit of in camera review and ordered Gammon to produce an affidavit. In its order, the trial court stated that "the State's and the public's interest in determining the identity of the person or persons responsible for the death of Eric Miller outweigh the public interest in protecting . . . the attorney-client privilege." *Id.* at 327–28, 584 S.E.2d at 782. The supreme court declined to apply a balancing test to determine the applicability of the attorney-client privilege. *Id.* at 332–33, 584 S.E.2d at 785. While noting elsewhere in the opinion that the common law "demonstrates a practical flexibility and ingenuity to accommodate exigent circumstances where required in the interest of justice," *id.* at 322, 584 S.E.2d at 778, the court preferred a bright line rule for determining when a privilege applies, *see id.* at 332–33, 584 S.E.2d at 785 (comparing the advantages and disadvantages of balancing tests as against bright line rules). The court's reasoning rested upon its concern that a balancing test would have "a corrosive effect on the privilege's traditionally stable application" and the likely consequence of judicial arbitrariness and inequality in determinations. *Id.* at 333, 584 S.E.2d at 785.

50. *Miller I*, 357 N.C. at 335, 584 S.E.2d at 786.

51. *See* State v. McIntosh, 336 N.C. 517, 523–24, 444 S.E.2d 438, 442 (1994).

52. *Id.* (quoting State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981)).

53. *Miller I*, 357 N.C. at 321, 584 S.E.2d at 778.

test without knowing the substance of the communications.[54] However, the court noted that in order to determine whether Willard's statement satisfies the third and fourth prongs of the *McIntosh* test—whether the communications relate to a matter about which the attorney is being professionally consulted and whether the communications were made in the course of giving or seeking legal advice for a proper purpose—the court must be privy to the contents of the communications.[55] Therefore, the court held that "where the party seeking the information has, in good faith, come forward with a nonfrivolous assertion that the privilege does not apply, the trial court may conduct an in camera inquiry of the substance of the communication."[56] The court concluded that it was proper for the trial court to order Gammon to provide a sealed affidavit containing a transcript of the conversations between himself and Willard in order for the trial court to ascertain whether the conversations were protected by the attorney-client privilege.[57] The court also held that disclosure of the conversations for in camera review does not have the legal effect of terminating the privilege.[58] The court concluded that if, upon examination of the contents, the conversations did not meet the *McIntosh* test, the attorney-client privilege does not apply and Gammon must reveal the substance of the conversations.[59]

The court's decision in *Miller I* provided guidance to lower courts evaluating a communication under the third and fourth prongs of the *McIntosh* test. Under *McIntosh*, only those communications that are part of the client's purpose for the legal consultation are privileged.[60] Thus, "communications between an attorney and a client that relate to or concern the interests, rights, activities, motives, liabilities, or plans of some third party, the disclosure of which would

54. These three *McIntosh* prongs inquire whether an attorney-client relationship existed at the time of the communication, whether the communication was made in confidence, and whether a client has waived the privilege, respectively. *See id.* at 336, 584 S.E.2d at 787.

55. *Id.*

56. *Id.* An in camera review is only necessary where the contents of the communication are not known to the trial court. In *McIntosh* and *Murvin*, the trial courts were privy to the contents of the respective communications and the only issue was whether to reveal the contents to the jury. *See McIntosh*, 336 N.C. at 523, 444 S.E.2d at 441 (appealing the trial court's decision to admit testimony of the defendant's attorney); State v. Murvin, 304 N.C. 523, 530, 284 S.E.2d 289, 294 (1981) (appealing the trial court's decision that the contents of an attorney's affidavit were not protected by the attorney-client privilege).

57. *Miller I*, 357 N.C. at 337, 584 S.E.2d at 788.

58. *Id.* at 337, 584 S.E.2d at 787.

59. *See id.*

60. *McIntosh*, 336 N.C. at 523, 444 S.E.2d at 442.

not tend to harm the client, do not logically fall within North Carolina's definition of attorney-client privileged information."[61]

The communications must also relate to a proper purpose. Thus, communications relating to a third party's criminal activity do not satisfy the fourth prong of *McIntosh* where disclosure of the communications would not tend to harm the interests of the client.[62] The *Miller I* court therefore concluded its application of *McIntosh* by observing that if Willard's statements implicated a third party as the killer, the communications were not privileged.[63] However, the court noted that if Willard's statements would subject him to criminal liability, regardless of whether they implicated a third party, the communications were covered by the privilege.[64] Therefore, according to the *Miller I* court, only those statements relating solely to a third party are not privileged.[65]

Prior to *Miller I*, a communication satisfying all five prongs of the *McIntosh* test ended the inquiry—the communication was privileged.[66] *Miller I* adds an additional layer of analysis in that meeting all five prongs of the *McIntosh* test no longer guarantees that a communication remains privileged. *Miller I* holds that where a communication meets the *McIntosh* test, the trial court should then apply the maxim *cessante ratione legis, cessat ipsa lex*: "[w]hen the underlying justification for the rule of law, or in this case the privilege, is not furthered by its continued application, the rule or privilege should cease to apply."[67] Accordingly, the trial court should inquire "whether nondisclosure in the present case furthers the purpose for which the privilege exists."[68] Therefore, where nondisclosure does not further the purpose of the privilege, the communication may be disclosed.

The court defines the purpose for which the attorney-client privilege exists in terms of the three consequences that might result

61. *Miller I*, 357 N.C. at 338, 584 S.E.2d at 788; *see also* Broun, *supra* note 41, at 50 (noting that the court's conclusion that the privilege does not extend to a conversation regarding the legal rights of a third party is "unquestionably consistent with existing authority").

62. *Miller I*, 357 N.C at 338, 584 S.E.2d at 788.

63. *Id.* at 340, 584 S.E.2d at 789.

64. *Id.*

65. *Id.* The court notes that where a person is acting as an agent of a third party principal when the communication is made, the communication is within the privilege. *Id.* at 340–41, 584 S.E.2d at 789–90.

66. *See McIntosh*, 336 N.C. at 523–24, 444 S.E.2d at 442 (finding a communication privileged after failing to inquire beyond the five prongs of the articulated test).

67. *Miller I*, 357 N.C. at 341, 584 S.E.2d at 790.

68. *Id.*

from disclosure of a client's communication with an attorney, labeling these consequences the *Swidler* factors:[69] "(1) that disclosure might subject the client to criminal liability; (2) that disclosure might subject the client, or the client's estate, to civil liability; and (3) that disclosure might harm the client's loved ones or his reputation."[70] The trial court should consider the *Swidler* factors during an in camera review of a privileged communication.[71] If disclosure of the communication implicates one of these consequences, the communication should remain undisclosed.[72] If, however, the communication would have no negative impact on the client's interests, the purpose for the privilege no longer exists and the communication may be disclosed.[73]

Employing the *Swidler* factors to determine whether communications should remain protected by the attorney-client privilege is unprecedented in North Carolina, and the ambiguity in the court's opinion raises questions about the scope of the protections afforded by the privilege. Namely, do the exceptions to the privilege outlined by the court apply only to fact situations similar to that in *Miller I* case, or is their application broader? If limited to the facts of *Miller I*, the holding will have little to no effect on the scope of the privilege. Conversely, a broad application of the exceptions could severely erode the attorney-client privilege.

The court begins by framing the issue presented in *Miller I* as applying in situations where the client is deceased and the information is sought for use in a criminal investigation.[74] However, the court does not clarify whether these limiting conditions apply to

69. In *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the United States Supreme Court addressed the question of whether the attorney-client privilege survives the death of the client. The Court noted that there are "weighty reasons" in favor of a posthumous application of the privilege, stating that "[w]hile the fear of disclosure . . . may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family." *Id.* at 407. It is this passage that the Supreme Court of North Carolina cites as the basis for its *Swidler* factors. However, the United States Supreme Court did not apply a formal three-factor test to determine whether and when the privilege applies but merely stated the possible concerns a client may have. *Id.* Thus, the so-called *Swidler* factors seem to be an invention of the Supreme Court of North Carolina.

70. *Miller I*, 357 N.C. at 341–42, 584 S.E.2d at 790.

71. *Id.* at 342, 584 S.E.2d at 790–91.

72. *Id.* at 342, 584 S.E.2d at 790.

73. *Id.* The court emphasized that its holding does not reach the question of whether such a communication would be admissible as evidence in a criminal proceeding. *Id.* at 343, 584 S.E.2d at 791.

74. *See supra* note 53 and accompanying text.

the application of the *McIntosh* test, to the application of the *Swidler* factors, or to the entire attorney-client privilege inquiry. Indeed, there is sufficient ambiguity in the court's opinion to conclude that these limiting conditions do not apply to any portion of the application of the *McIntosh* test. Given this confusion, it is necessary to examine the scope of the application of the *McIntosh* test before exploring the ambiguities surrounding the application of the *Swidler* factors. Clarifying the scope of the application of the *McIntosh* test may explain the intended scope of the *Swidler* factors.

Portions of *Miller I* can be construed as requiring the presence of two conditions before a court can conduct an in camera review of an attorney-client communication for purposes of applying the *McIntosh* test: the client must be deceased, and the information must be sought for use in a criminal investigation.[75] The court begins its opinion in *Miller I* by framing the question presented as whether an exception to the attorney-client privilege is warranted where there is a criminal investigation and the client is deceased. Additionally, the summary of the opinion is prefaced with the phrase: "we hold that when a client is deceased . . . ."[76] These general statements imply that the context of a criminal investigation and the death of the client are necessary conditions for any portion of the *Miller I* analysis to apply. However, a quick study reveals that the *McIntosh* test is equally applicable in situations where the client is living and, most likely, can be employed in the civil context.[77]

The two prior cases employing the *McIntosh* test—*State v. McIntosh*[78] and *State v. Murvin*[79]—involved clients living at the time of trial. This fact is conclusive evidence that the test is not limited to situations where the client is deceased and indicates the *Miller I* court did not intend the limiting language "we hold that when a client is deceased . . ." to apply to the *McIntosh* test.

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75. *See supra* note 53 and accompanying text.

76. *Miller I*, 357 N.C. at 342, 584 S.E.2d at 791.

77. Interestingly, in arguing for the application of an interests of justice balancing test, the State envisioned several limiting conditions, including: (1) the client must be deceased; (2) the case must be a criminal matter; and (3) the crime must be murder. *See* Brief for Appellee at 72–74, *Miller I* (No. 303PA02) (listing seven limiting conditions), *available at* http://www.ncappellatecourts.org/nc_main_1.nsf (on file with the North Carolina Law Review). These conditions have no bearing on the court's holding in *Miller I*, because the court declined to adopt the balancing test. *See supra* note 49 and accompanying text.

78. 336 N.C. 517, 444 S.E.2d 438 (1994).

79. 304 N.C. 523, 284 S.E.2d 289 (1981). The so-called *McIntosh* test was first applied thirteen years prior to *McIntosh* in *State v. Murvin*. *Id.* at 531, 284 S.E.2d at 294. The Supreme Court of North Carolina refers to the five-prong test as the *McIntosh* test.

Less clear is whether a court can apply the *McIntosh* test in a civil case. Thus far, the test has only been applied in criminal cases like *McIntosh*, *Murvin*, and *Miller I*. However, the factors themselves are not written in terms that restrict them to application in a criminal context, and in *Miller I* the court discusses the application of the third and fourth prongs of the test in general terms.[80] Further, while the court uses limiting language throughout its opinion,[81] its formulation of when to apply the *McIntosh* test makes no mention of necessary conditions limiting application of the test to the criminal context. Instead, *Miller I* states that where a party applies to the court in good faith and with a nonfrivolous assertion that the privilege does not apply, the court may conduct an in camera review of the communication to determine if it meets the *McIntosh* criteria.[82]

The court's use of general language when explaining the application of the *McIntosh* test is by no means a guarantee that the *McIntosh* inquiry is applicable in civil cases, and it is possible that a later court will expressly limit the inquiry to the criminal context. In the absence of a final determination of the scope of *McIntosh*'s application, prudent attorneys should presume it is equally applicable in the civil context.

Having addressed the impact of the limiting conditions of the death of the client and the context of a criminal investigation on the *McIntosh* test, the question remains whether the scope of the application of the *Swidler* factors is limited to situations analogous to the facts of *Miller I* or if it has broader implications. A court only applies the *Swidler* factors if it finds that the communication is otherwise privileged under *McIntosh*.[83] Because it is apparent that the *McIntosh* test is not restricted by the limiting language of *Miller I*, and because it is likely the court purposefully included the statements restricting its holding to situations where the client has died and the information is sought for use in a criminal investigation, it follows that the court directed that limiting language to the application of the *Swidler* factors.[84]

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80. *See Miller I*, 357 N.C. at 337–38, 584 S.E.2d at 788.

81. *See supra* note 53 and accompanying text.

82. *Miller I*, 357 N.C. at 336, 584 S.E.2d at 787.

83. *See supra* note 69 and accompanying text.

84. *Miller I*, 357 N.C. at 321, 584 S.E.2d at 778 (framing the issue in the case as "whether, during a criminal investigation, there can be a legal basis for the application of the interest of justice balancing test or an exception to the attorney-client privilege which would allow a trial court to compel the disclosure of confidential attorney-client communications when the client is deceased"). In addition to the general statements regarding the death of the client and the necessity of a criminal investigation, the court

If the *Swidler* factors are not so restricted, then *Miller I* severely corrodes the protections of the attorney-client privilege. To illustrate the extent to which a broad interpretation of *Miller I* could reduce the protections of the privilege, consider a hypothetical situation Professor Kenneth Broun posed in his article *Death and the Privilege*.[85] Assume a client consults a lawyer with regard to his civil liability in a tort claim involving several defendants. The client settles his dispute, but the other defendants proceed to trial where the client's lawyer is called as a witness. It is unclear whether the privilege would still attach to the client's communication or whether a court would apply the *Swidler* factors and require disclosure upon determining that the client would no longer be negatively impacted by the attorney's testimony.[86] A finding that a court might apply the *Swidler* factors in such a situation could chill a client's willingness to engage in a "full and frank communication" with his attorney.[87]

Establishing how broadly the courts will apply the *Swidler* factors is therefore critical in determining the impact *Miller I* actually has on changing the level of protection afforded by the attorney-client privilege. Unfortunately, the court did not clearly set boundaries for the application of the *Swidler* factors, and the court should clarify this point at the next possible opportunity. Until the court expressly addresses this question, an examination of the court's treatment of the *Swidler* factors in *Miller I* and its subsequent review of the trial court's application of the *Miller I* holding in *In re Investigation of Death of Eric Miller* (*Miller II*)[88] must suffice as a means of interpreting the scope of the application of the *Swidler* factors.[89]

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stated that where the communications are outside of the scope of the privilege, "the trial court may compel the attorney to provide the substance of the communication to the State for its use in the criminal investigation." *Id.* at 343, 584 S.E.2d at 791.

85. Broun, *supra* note 41. Professor Broun maintains that the court's application of *cessante ratione legis, cessat ipsa lex* does not follow from the rationale of the attorney-client privilege. *Id.* at 50. The purpose of the privilege is to encourage communication of information between attorney and client, not to protect the client from adverse consequences. *Id.* Professor Broun argues that the court departed from existing authority in applying this maxim to the attorney-client privilege, warning that the broad language employed by the court may make it difficult to limit the impact of the holding to situations similar to that in the Miller case. *Id.* at 50–51.

86. *Id.* at 50.

87. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

88. 358 N.C. 364, 595 S.E.2d 120 (*Miller II*) (2004).

89. *Miller I* remanded the case to the trial court for a determination on whether the information contained in Gammon's affidavit was privileged. The trial court found the information was not protected, but required the affidavit to remain sealed pending review by the Supreme Court of North Carolina. *Id.* at 367–68, 595 S.E.2d at 122–23.

The first *Swidler* factor a court must consider is whether disclosure of a communication would subject the client to criminal liability.[90] Despite appearing to apply only to living clients—since the threat of criminal liability would not have a negative impact on a deceased client—this factor also applies to deceased clients. While the supreme court did not reach the *Swidler* factors portion of the analysis in *Miller II*,[91] the court noted that it did not disagree with the trial court's conclusion that disclosure would not expose Willard to criminal liability "even if he were living."[92] Coupled with the limiting language employed in *Miller I*, this application of the first *Swidler* factor indicates the court's intent to limit the application of the *Swidler* factors to deceased clients. Despite this apparent intent, there is sufficient ambiguity in the court's phrasing to allow a subsequent court to interpret the application broadly and apply it to situations in which the client is living.

The second *Swidler* factor considers whether disclosure might subject the client or the client's estate to civil liability.[93] The fact that this factor references civil liability raises the question of whether the holding is limited to the use of privileged information for the furtherance of criminal investigations. The court appears to deny any such limitation in the summary of its holding in *Miller I*, restating the *Swidler* inquiry as allowing disclosure "upon a clear and convincing showing that . . . disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation."[94] This restatement fosters the inference that a court may employ the factors outside of the criminal context.[95]

The third *Swidler* factor, which is the least well-explained and defined of the three, further limits the situations to which the *Swidler* inquiry would apply. This factor inquires whether disclosure would

90. *Miller I*, 357 N.C. at 341–42, 584 S.E.2d at 790.

91. *Miller II*, 358 N.C. at 369, 595 S.E.2d at 123. The court found that it was unnecessary for the trial court to determine whether the communication affected Willard's rights and interests because the communication failed the *McIntosh* test, and therefore the trial court should have stopped its analysis before reaching the *Swidler* factors. *Id.* at 369, 595 S.E.2d at 123. Thus, the court's discussion of the *Swidler* factors is dicta.

92. *Id.*

93. *Miller I*, 357 N.C. at 342, 584 S.E.2d at 790.

94. *Id.* at 343, 584 S.E.2d at 791.

95. This restatement also supports, but does not expressly ratify, the conclusion that the *Swidler* factors apply only where the client is deceased.

harm the client's loved ones or his reputation.[96] Thus, even in a situation where disclosure would not subject a client to criminal or civil liability, a court has the discretion to suppress the information based on a determination that disclosure would harm the client's reputation or family. This discretion could drastically narrow the pool of potential cases where the application of the *Swidler* factors would result in the disclosure of privileged communications.

The court indicated in *Miller II* that *Miller I* should be viewed as a very narrow exception to the attorney-client privilege.[97] Following *Miller I*, attorney Gammon delivered a seven-page affidavit detailing his conversations with Willard to the superior court.[98] The trial judge concluded that its contents were not protected by the attorney-client privilege but kept the contents under seal while Gammon appealed the decision.[99] The Supreme Court of North Carolina affirmed the trial court's conclusion that the contents of the affidavit, in particular "Paragraph 12,"[100] related solely to the activities of a third party, were not privileged under the *McIntosh* test, and were therefore subject to disclosure.[101] The court ended its opinion with a cautionary note emphasizing that "this very narrow exception to the attorney-client

96. *Miller I*, 357 N.C. at 342, 584 S.E.2d at 790. The phrasing of this factor also supports the conclusion that the *Swidler* factors are only applied where the client is deceased.

97. *Miller II*, 358 N.C. at 370, 595 S.E.2d at 124.

98. *Id.* at 367, 595 S.E.2d at 122.

99. *See* Cain, *supra* note 3.

100. As summarized by the Wake County Assistant District Attorney, Paragraph 12 reads as follows:

> Mr. Willard then stated that on one recent occasion he had met Mrs. Miller in a parking lot, and they had a conversation while in an SUV. He stated that during this conversation Mrs. Miller was crying and that she told him she had been to the hospital where Mr. Miller had been admitted. She stated to Mr. Willard that she was by herself in the room with Mr. Miller for a period of time. She then told Mr. Willard that she took a syringe and needle from her purse and injected the contents of the syringe into Mr. Miller's I.V. Upon being questioned as to the contents of the syringe, Mr. Willard either stated the substance was from work or that Mrs. Miller had told him it was from work. He then stated that he asked Mrs. Miller why she had done this, and she replied, "I don't know." Mr. Willard surmised that Mrs. Miller was attempting to end Mr. Miller's suffering from his illness with these actions. Although Mr. Gammon and Mr. [Trey] Fitzhugh do not recall specifically whether Mr. Willard or Mrs. Miller used the word "arsenic" with reference to the contents of the syringe, it was clear that the substance contained in the syringe was poisonous. Mr. Willard then stated that he knew nothing further of the circumstances surrounding Eric Miller's death. He also stated that he had not told anyone, including his wife, about Mrs. Miller's statements to him.

Id.

101. *Miller II*, 358 N.C. at 369, 595 S.E.2d at 123.

privilege should be appropriately limited both as to its scope and method of disclosure."[102]

While it therefore remains unclear whether the review of attorney-client privilege outlined in *Miller I* is limited to situations where the client is deceased and there is a criminal investigation, the court has expressed its intent to keep the exception narrow. Application of the third and fourth prongs of the *McIntosh* test seem to apply to all attorney-client communications and is not limited to situations where the client is deceased or the context is criminal.[103] Less clear is whether application of the *Swidler* factors is intended to apply to all situations or is circumscribed to situations similar to the facts of the *Miller* case. The *Swidler* factors could serve as an all-purpose exception to the rule of attorney-client privilege for cases like the *Miller* case where the public interest in knowing the substance of the communications is great. The court's opinion does not foreclose this possibility. However, *Miller I* strongly suggests that, at the very least, the application of the *Swidler* factors is limited to situations where the client is deceased, and future courts are likely to interpret the holding to comport with those indications.[104]

Additionally, the court's warning that the test set out in *Miller I* represents a narrow legal standard makes a broad application of the *Swidler* factors unlikely.[105] If future courts interpret *Miller I* as allowing the *Swidler* factors to act as an all-purpose exception to the attorney-client privilege, they may find it necessary to employ the type of interests of justice balancing test that the court disavowed in *Miller I*[106] and *Miller II*[107] in order to choose the cases to which it ought apply—determining whether the public interest in knowing the substance of the communications outweighs the public interest in protecting the attorney-client privilege. The Supreme Court of North Carolina intended *Miller I* to provide a bright line rule for the determination of privilege.[108] It is therefore unlikely that future courts will construe *Miller I* in a manner requiring the use of a

102. *Id.* at 370, 595 S.E.2d at 124.

103. This conclusion is based on the fact that the authority upon which the court's interpretation relies involves a living client. *See* State v. Murvin, 304 N.C. 523, 530–31, 284 S.E.2d 289, 294 (1981). Application of the fourth *McIntosh* factor is limited to the criminal context by its terms, since the inquiry focuses on whether the consultation is for a proper purpose. This conclusion is also consistent with *Murvin*, which involved the criminal prosecution of the client's boyfriend. *Id.*

104. *See supra* notes 84, 91–93 and accompanying text.

105. *See supra* note 102 and accompanying text.

106. *See Miller I*, 357 N.C. 316, 333, 584 S.E.2d 772, 785 (2003).

107. *See Miller II*, 358 N.C. at 369, 595 S.E.2d at 123.

108. *See Miller I*, 357 N.C. at 332–33, 584 S.E.2d at 785.

balancing test. Having explained the application of the *McIntosh* factors and the *Swidler* test, the analysis now turns to the admissibility of attorney-client communications under the rules of evidence.

Determining whether and when an attorney-client communication may be disclosed using the *McIntosh* factors and the *Swidler* test is only the first half of the inquiry. A court concluding that a communication is not privileged must still address the issue of whether the communication is admissible at trial. The admissibility of an out-of-court communication hinges on two determinations: whether it fits within a hearsay exception and whether it violates the Confrontation Clause.

The North Carolina Rules of Evidence prohibit the admission of hearsay, or out-of-court statements, absent a statutory exception.[109] The admission of "Paragraph 12" raises a double hearsay issue. Willard's statement to Gammon is hearsay, and Gammon's affidavit, containing Willard's statement, represents a second level of hearsay. Thus, Willard's statement is admissible, and Gammon is required to testify only if the statement fits within a hearsay exception.[110] The Supreme Court of North Carolina did not reach this issue in *Miller I*.[111]

Regardless of whether Willard's statement is admissible hearsay, a court cannot admit it as evidence if such an admission violates the Confrontation Clause. The United States Supreme Court's opinion in *Crawford v. Washington*[112] redefines the role of the Confrontation Clause in relation to testimonial hearsay and changes the way courts determine whether hearsay is admissible in a criminal prosecution. A determination of whether Willard's statement is admissible under the Confrontation Clause thus requires an analysis of the holding in *Crawford*.

The Sixth Amendment's Confrontation Clause guarantees that in criminal prosecutions "the accused shall enjoy the right . . . to be confronted with the witnesses against him."[113] Prior to *Crawford*, under *Ohio v. Roberts*,[114] an out-of-court statement could be admitted in a criminal prosecution so long as it had "adequate indicia of

109. *See* N.C. R. EVID. 802.

110. In the alternative, Gammon's affidavit would also have to fit a hearsay exception. However, since the affidavit was ordered by the court, and since Gammon is available to testify, it is likely that the court will either require him to testify or find the affidavit fits into the residual exception of the hearsay rule. *See* N.C. R. EVID. 803(24).

111. *Miller I*, 357 N.C. at 344, 584 S.E.2d at 792.

112. 541 U.S. 36 (2004).

113. U.S. CONST. amend. VI.

114. 448 U.S. 56 (1980).

reliability," meaning it fell within a "firmly rooted hearsay exception" or it bore "particularized guarantees of trustworthiness."[115] *Crawford* held that where testimonial hearsay is concerned, the Confrontation Clause requires that the declarant be unavailable and that the accused had a prior opportunity to cross-examine the declarant.[116] Both conditions must be satisfied, or the evidence is inadmissible.[117] *Crawford* only applies to testimonial hearsay.[118] The Supreme Court declined to fully define the term "testimonial," stating that at a minimum the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[119] The Court referenced other formulations of the term "testimonial," including "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[120]

Crawford also left open the question of whether the *Roberts* standard continues to apply to nontestimonial hearsay, or if the Confrontation Clause is altogether unconcerned with nontestimonial hearsay.[121] That is, if a statement is deemed nontestimonial and therefore is not bound by the *Crawford* requirements, must that statement meet the standards set forth in *Roberts*, or is it automatically admissible? Lower federal courts have reached different conclusions when addressing the issue.[122] The Court of Appeals of North Carolina also appears to be undecided whether *Roberts* applies to nontestimonial evidence. In 2004, the court of

115. *Id.* at 66. *See generally* Idaho v. Wright, 497 U.S. 805 (1990) (explaining and applying the *Roberts* approach).

116. *Crawford*, 541 U.S. at 68.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)).

121. *See id.* at 62 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."); Ferguson v. Roper, 400 F.3d 635, 638–40 (8th Cir. 2005); Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 515 (2005) (stating that *Crawford* left unresolved "what remains of the old system under *Roberts*").

122. *Compare* United States v. Hendricks, 395 F.3d 173, 179 (3d Cir. 2005) (holding that nontestimonial statements continue to be subject to the *Roberts* standard), *with* United States v. Rueda-Rivera, 396 F.3d 678, 680 (5th Cir. 2005) (holding that, in light of *Crawford*, the Confrontation Clause does not bar admission of nontestimonial statements and making no mention of *Roberts*).

appeals applied *Roberts* to nontestimonial hearsay and explicitly held that *Roberts* remains good law for nontestimonial statements.[123] Despite this declaration that *Roberts* applies, the court of appeals declined to apply *Roberts* the following year in *State v. Brigman*.[124] It is too soon to determine *Crawford*'s full implications. Like any new legal standard, the holding in *Crawford* will be defined and shaped by later court decisions.

As soon as the Supreme Court of North Carolina announced the *Miller II* decision, attorneys began debating whether the holding in *Crawford* would keep Willard's statement to Gammon out of the courtroom in the State's prosecution of Kontz.[125] *Crawford*'s application hinges on whether Willard's statement fits the definition of a testimonial statement. Based on the limited description of the term "testimonial" provided by the United States Supreme Court in *Crawford*, Willard's statement does not seem to qualify. His statement was not made in a formal legal context, and it is reasonable to assume that he did not expect his private conversation with his attorney to be used in the courtroom.

Defining Willard's statement as nontestimonial means *Crawford* and its requirement that the accused receive an opportunity for prior cross-examination of the declarant would not apply. However, Willard's statement would still have to fall within a hearsay exception, and possibly also meet the requirements of reliability set forth by the United States Supreme Court in *Roberts*, to be admissible. Neither of these procedural hurdles, however, should pose a significant problem to admitting the statement in court. The North Carolina Rules of Evidence contain a catch-all exception to the hearsay rule.[126] When

123. State v. Blackstock, 165 N.C. App. 50, 66 n.2, 598 S.E.2d 412, 422 n.2 (2004) ("Although *Crawford* overrules the *Roberts* framework to the extent that it applies to testimonial statements, *Roberts* remains good law regarding nontestimonial statements."), *discretionary review denied*, 610 S.E.2d 208 (N.C. 2005).

124. 615 S.E.2d 21 (N.C. App. 2005). The *Brigman* court found the declarant's statement to be nontestimonial and held *Crawford* did not apply. *Id.* at 25. The court then quoted *Crawford* as allowing states flexibility in the development of hearsay law, and upheld the trial court's decision to admit the statements. *Id.* at 26. The court never mentions *Roberts*. Interestingly, the author of the *Blackstock* opinion was on the panel that decided *Brigman* and concurred with the result. *Id.* The *Brigman* court even cites to the *Blackstock* decision as authority for its finding that the challenged statement is nontestimonial. *Id.* at 25.

125. *See* Andrea Weigl, *Secrets May Not Ever Go to Jury: Willard's Tale May Not Be Admissible*, NEWS & OBSERVER (Raleigh, N.C.), June 13, 2004, at B1.

126. *See* N.C. R. EVID. 803(24); *see also id.* R. 804(b)(5) (containing the same residual exception as is found in Rule 803(24) but applying the exception to situations where the declarant is unavailable). Rule 804(b)(5) is implicated in this situation, because Willard, the declarant, is unavailable. However, there is no practical difference on these facts

hearsay does not fit any of the specific statutory exceptions, a court may nonetheless admit the statement, provided it has "equivalent circumstantial guarantees of trustworthiness," is offered as evidence of material fact, is more probative than any other evidence, and "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."[127]

A statement admitted under the catch-all exception should likewise pass the test set forth in *Roberts*, assuming the Confrontation Clause applies to nontestimonial statements. This conclusion is not based on the belief that Willard's statement to Gammon is inherently trustworthy. Indeed, one could argue that Willard may have lied about his lack of involvement in Miller's death to protect his family after his death by removing his name as a suspect.[128] Rather, this conclusion stems from a belief that the court's past willingness to amend the boundaries of the attorney-client privilege—a willingness on display in *Miller I*—indicates the court's unexpressed desire to ensure that Willard's statement is disclosed and used in the criminal proceedings. The *Roberts* test and the application of the catch-all hearsay exception are determined within a trial court's discretion.[129] It is therefore likely that the court will find the conditions proper for admitting Willard's statement into evidence.

A careful study of the holding in *Miller I* is important because of its potential impact on the everyday practice of North Carolina attorneys. Does the outcome change the way attorneys conduct their practice, or is the holding narrowly tailored to the facts of *Miller I*?

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between the application of Rules 803(24) and 804(b)(5), because both require the same standard of trustworthiness before a court will admit the proffered hearsay.

127. *Id.* R. 804(b)(5). The catch-all exception would likely be implicated in this case because it does not appear that Willard's statement meets the criteria of any of the other hearsay exceptions. For example, Willard's statement is not a statement against interest, *see id.* R. 804(3), because it does not expose Willard to criminal liability, *see also Miller II*, 358 N.C. 364, 369, 595 S.E.2d 120, 123 (2004) (agreeing with the trial court's conclusion that disclosure would not subject Willard to criminal liability). For a detailed discussion of the six-step inquiry a court must make before allowing evidence under the catch-all exception, see *State v. Smith*, 315 N.C. 76, 90–98, 337 S.E.2d 833, 843–48 (1985).

128. Criminal defense attorneys maintain that their clients are sometimes reluctant to be completely honest in attorney-client conversations. *See* Weigl, *supra* note 125.

129. *See* N.C. R. EVID. 803(24), 804(b)(5) (stating that hearsay is admissible if a court determines: (A) it is offered as evidence of a material fact; (B) it is more probative than any other evidence that can be procured through reasonable efforts; and (C) the purpose of the rules of evidence and the interests of justice will be best served by admitting the hearsay into evidence); Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that a court must find that a hearsay statement bears "adequate indicia of reliability" before admitting it); *Smith*, 315 N.C. at 97, 337 S.E.2d at 847 (noting that admissibility of hearsay statements under Rule 803(24) "is within the sound discretion of the court").

The opinion makes it clear that any attorney-client communication regarding a third party that does not expose the client to criminal or civil liability is not protected by the attorney-client privilege.[130] Attorneys should be mindful of this exception and, if the situation demands, should inform their clients of it. However, it is important to note that comments relating to a third party that are defined out of the attorney-client privilege by *Miller I* may still be privileged under the North Carolina Rules of Professional Conduct, meaning that absent a court order, an attorney may not unilaterally decide to reveal the contents of the communication.[131]

It is less clear what impact the court's adoption of the *Swidler* factors will have on the way attorneys in North Carolina practice. Given the court's declaration in *Miller II* that "this very narrow exception to the attorney-client privilege should be appropriately limited both as to its scope and method of disclosure," future courts will probably err on the side of safety and construe *Miller I* as narrowly as possible.[132] It is therefore unlikely that future courts will employ the *Swidler* inquiry in cases where the communication is privileged under *McIntosh* unless the client is deceased and there is a criminal investigation pending. Because it is unlikely that the *Swidler* factors will be applied in situations distinguishable from the facts in *Miller I*, the court's opinion in *Miller I* should have little to no impact on the way attorneys in North Carolina practice. However, the fact that the supreme court was willing to create the *Swidler* factors to accommodate the rare facts of *Miller I* demonstrates that the next unusual case may lead to application of the *Swidler* factors in other contexts, further eroding the attorney-client privilege. If courts do apply the *Swidler* factors in other contexts, they will likely do so only after conducting an interests of justice balancing test to keep the factors from becoming an all-purpose exception.[133]

Finally, attorneys should recognize that when an attorney-client communication is not privileged under either the *McIntosh* or the *Swidler* tests, the communication will likely be admissible under the North Carolina Rules of Evidence. While the definition of

130. *See supra* notes 60–65 and accompanying text.

131. *See supra* note 10 and accompanying text.

132. *See supra* note 103 and accompanying text.

133. The alternative would be a mechanical application of *Swidler* wherever disclosure would tend not to harm the client's interests. This result would directly contravene the Supreme Court of North Carolina's instruction that *Miller I* constitutes a narrow exception to the attorney-client privilege. Note, however, that the Supreme Court of North Carolina expressly held in *Miller I* and *Miller II* that such a balancing test should not be conducted. *See supra* notes 105–08 and accompanying text.

testimonial statements under *Crawford* is far from settled, attorney-client communications will probably fall into the category of nontestimonial hearsay. This will mean there is no requirement that the declarant be unavailable and that the accused was granted an opportunity to cross-examine the declarant in order for the statement to be admissible. Even if the *Roberts* standard applies to nontestimonial hearsay, a client's communication with an attorney should fit within the particularized-guarantees-of-trustworthiness exception to the hearsay rule.

Some will argue that *Miller I* is an example of the old adage that hard facts make bad law,[134] concluding that, in its efforts to ensure that Willard's statement could be used to help convict Eric Miller's murderer, the court wrongly eroded the sanctity of the attorney-client privilege. It is difficult to find the correct balance between the competing values of protecting the attorney-client privilege and the right of the accused to confront witnesses against the public's interest in convicting a murderer. Depending on how *Miller I* is interpreted by future courts, the Supreme Court of North Carolina may have achieved such a balance. The holding in *Miller I* should be narrowly construed and applied only in cases with facts similar to the facts in *Miller I*. If this course is followed, then *Miller I* will stand merely for the proposition that in cases of extreme public need, and where disclosure of a privileged statement would not harm the client, the courts have the power to abrogate the attorney-client privilege. This result appears to be a fair trade for the advantages such a rule will have in future criminal investigations.

SARAH A. L. PHILLIPS

134. *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (stating that "[g]reat cases like hard cases make bad law" because they appeal "to the feelings and distort[] the judgment").